Supreme Court, U.S.
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No. 09-1215

In The Supreme Court of the United States

GREGORY LYNN NORWOOD,

Petitioner,

v.

STEVE J. VANCE; MIKE KNOWLES, WARDEN, CSP-SACRAMENTO; THOMAS P. GOUGHNOUR; CHERYL PLILER, FORMER WARDEN, CSP-SACRAMENTO; DAVID I. WILLEY; JAMES P. WALKER, ASSOCIATE WARDEN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In this case, the jury found that prison officials unconstitutionally deprived the petitioner of outdoor exercise during four extended prison lockdowns of 370 days. Although the respondents failed to preserve their affirmative defense in the trial court, the Ninth Circuit vacated the jury's verdict finding that the officials were entitled to qualified immunity. This disposition is contrary to this Court's holding in *Ortiz v. Jordan,* 131 S.Ct. 884 (2011). Therefore, this Court should grant the petition for a writ of certiorari, vacate the court of appeals' judgment, and remand for further consideration (GVR) so that the Ninth Circuit can conform its decision on qualified immunity to this Court's recent ruling.

The Ninth Circuit also concluded that the district court erred in rejecting the respondents' jury instruction on the degree of deference to which prison officials were entitled. The Ninth Circuit erroneously held that respondents were entitled to the deference accorded in emergency cases of violence, *Whitley v. Albers*, 475 U.S. 312 (1986), rather than the deliberate indifference standard appropriate in on-going prison condition cases, *Farmer v. Brennan,* 511 U.S. 825 (1994). This Court should grant certiorari to resolve this issue.

I. IN LIGHT OF THIS COURT'S RECENT DECISION IN *ORTIZ V. JORDAN*, THE NINTH CIRCUIT ERRED BY CONSIDERING QUALIFIED IMMUNITY ON APPEAL AFTER RESPONDENTS FAILED TO PRESERVE THAT AFFIRMATIVE DEFENSE FOLLOWING A FULL TRIAL ON THE MERITS.

In *Ortiz v. Jordan*, this Court unanimously resolved a circuit conflict, holding that a party may not appeal a denial of summary judgment after a district court has conducted a full trial on the merits. *Ortiz v. Jordan*, 131 S.Ct. at 888-89. The procedural history in *Ortiz* closely mirrors that of this matter. In *Ortiz*, the defendants filed a pretrial motion for summary judgment on the basis of qualified immunity. As in the present case, the district court denied the motion, concluding "that the qualified immunity defense turned on material facts genuinely in dispute." *Id.* at 888. After a full trial on the merits and a jury award in favor of Ms. Ortiz, the defendants attempted to appeal the pretrial order denying their motion for summary judgment in the same manner that defendants in this case attempted to do so in the Ninth Circuit. After the Sixth Circuit reversed the district court in *Ortiz*, this Court granted certiorari and held that a party may not appeal a denial of summary judgment after a full trial on the merits. The procedural similarities render this case appropriately within the purview of this Court's holding in *Ortiz*. The district court in this case denied respondents' motion for summary judgment based on a qualified

immunity affirmative defense. The district court found genuine issues of material fact in dispute, specifically, that defendants had not provided evidence that the initial security emergency that prompted the lockdowns continued until exercise was resumed, or that there was a legitimate reason that the African-American inmates were the last group to resume exercise after two of the four lockdowns. App. to Pet. Cert. 104-105.

Because the district court denied respondents' qualified immunity motion for summary judgment based on the existence of disputed facts, the order was not immediately appealable. *Johnson v. Jones*, 515 U.S. 304, 313 (1995). In their pretrial statement, respondents noted that "entitlement to qualified immunity at trial will depend on what evidence is produced to the court for determination of this issue." *Norwood v. Vance*, 591 F.3d 1062, 1076 (9th Cir. 2010) (Thomas, J., dissenting). The case then proceeded to trial and "after a jury was seated, the issue of qualified immunity was never mentioned again in the district court." *Id.* Respondents failed to file a Rule 50(a) motion before the case was submitted to the jury which therefore precluded them from renewing the motion for judgment as a matter of law based on qualified immunity after trial under Fed. R. Civ. P. 50(b). "Accordingly, even if the District Court was inclined to grant a new trial on the basis of arguments raised in respondent's preverdict motion, it was without the power to do so under Rule 50(b) absent a postverdict motion pursuant to the rule."

Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc., 546 U.S. 394, 405 (2006). "Absent such a motion, an appellate court is 'powerless' to review the sufficiency of the evidence after trial." *Ortiz v. Jordan*, 131 S.Ct. at 892 (citing *Unitherm*, *supra*). Respondents' failure to file a Rule 50(a) or a 50(b) motion in this case was the same error that this Court found to be fatal to the respondents' qualified immunity defense in *Ortiz*. Thus, the Ninth Circuit erred when it allowed respondents to renew a defense on appeal that they had abandoned at trial.

Respondents' argument that petitioner waived respondents' waiver of qualified immunity as an affirmative defense is rendered moot by this Court's decision in *Ortiz* because here, as in *Ortiz*, there was a full trial on the merits and respondents failed to preserve that defense at the trial level. Therefore, it is immaterial whether Mr. Norwood should have argued waiver in his appellee's response brief rather than addressing qualified immunity on the merits because the respondents inappropriately raised qualified immunity on appeal. Moreover, the dissenting opinion correctly notes that the Ninth Circuit has "never held that [it] must reach the merits of an immunity defense abandoned by the government below when the plaintiff fails to argue waiver in the briefs." *Norwood*, 591 F.3d at 1076, n. 6 (Thomas, J., dissenting). As Judge Thomas explained, "While the majority cites several of our cases for the proposition that the Court does not address waiver if not raised by the opposing party, none of these cases involved a

party's failure to raise properly a defense to liability in the trial court." *Id.*

"The Supreme Court or any other court of appellate jurisdiction may . . . vacate . . . any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and . . . require such further proceedings to be had as may be just under the circumstances." *Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (per curiam) (quoting 28 U.S.C. § 2106). This Court has repeatedly held that GVR is appropriate in situations where the Court believes that the court below did not have an opportunity to fully consider recent or intervening developments, and that "there is a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Id.* at 167. In light of this Court's recent decision in *Ortiz*, the petition should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration.

II. THE NINTH CIRCUIT ERRED IN VACATING THE JURY VERDICT FOR INSTRUCTIONAL ERROR: THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY ON THE DELIBERATE INDIFFERENCE STANDARD.

Mr. Norwood brought an Eighth Amendment challenge to the conditions of his confinement, specifically arguing that prison officials were deliberately

indifferent to his constitutional right to outdoor exercise. The jury was properly instructed on the *Farmer* deliberate indifference standard. *Farmer v. Brennan*, 511 U.S. 825 (1994). In the trial court – before a jury found in favor of the petitioner – the respondents conceded that the jury was properly instructed on the appropriate standard, and they did not object to the instruction given by the district court.[1] *Norwood*, 591 F.3d at 1071. As the dissent notes, the instructions "set forth – almost verbatim – the deliberate indifference culpability standard for cases involving challenges to prison conditions announced" by this Court in *Farmer*. *Norwood*, 591 F.3d at 1073 (Thomas, J., dissenting).

Although they failed to preserve the objection at trial, on appeal respondents contended that they were entitled to the jury instruction that is applied in cases of emergency violence as set out in *Whitley v. Albers*, 475 U.S. 312 (1986). *Whitley* is context specific for excessive force cases. Indeed, in respondents' opposition to the petition for certiorari, respondents concede that the *Whitley* standard is specifically designed for, and used in situations where prison officials stand accused of using excessive physical force in violation of the Eighth Amendment. Resp. Br. in Opp. to Pet.

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[1] Due to the fact that the FRCP 51 argument is not being considered in this petition, petitioner will not brief the merits of this issue, but finds it useful to note that respondents at one time were satisfied with the deliberate indifference instruction before a jury found them liable based on the approved instruction.

Cert. 23; *Norwood*, 591 F.3d at 1072-73 (citing *Whitley*, 475 U.S. at 321-22); *see* Ninth Circuit Manual of Model Jury Instructions § 9.24 (2007 ed.).

The jury in this case was not given the heightened deference instruction that is used in excessive force cases because the jury was not being asked whether the prison officials used excessive force against Mr. Norwood. Rather, the jury was asked to consider whether prison officials were deliberately indifferent to Mr. Norwood's constitutional right to exercise, a determination which appropriately applied this Court's standard of deliberate indifference. Petitioner does not disagree with the assertion that prison officials are "entitled to deference whether a prisoner challenges excessive force or conditions of confinement," 591 F.3d at 1067, but petitioner contests the hyper-extended leap made by the Ninth Circuit in determining that the very same deference standard is required in each case, even when the conditions of confinement standard already incorporates the appropriate level of deference for prison officials.

Following the decision below, the additional deference language, which has traditionally only applied to excessive force cases was added to the model jury instruction for deliberate indifference claims utilized throughout the Ninth Circuit. *See* Ninth Circuit Manual of Model Jury Instructions § 9.25 (Nov. 2010 rev.). This Court should grant certiorari to determine that the Ninth Circuit erred in requiring a jury instruction providing deference to prison officials'

judgment in a general conditions of confinement case where the evidence showed the officials' decisions were deliberate and calculated, rather than in response to an immediate violent confrontation. The Ninth Circuit is the largest circuit and comprises nearly twenty percent of the United States population. Brian Fitzpatrick, *Disorder in the Court*, L.A. Times, July 11, 2007. The addition of deference language to the model jury instruction applicable to almost one-fifth of the country demonstrates the urgency for a swift and deliberate resolution of the issue by this Court.

In defense of their erroneous position, respondents claim that both the excessive force scenario in *Whitley* and the deliberate indifference facts in the instant case developed from the same root cause: a riot or lesser disruption which require prison officials to act quickly and decisively. Resp.'s Br. in Opp. to Pet. Cert. 23-24. The respondents contend, therefore, that the same deference afforded to prison officials in excessive force cases involving split-second decisions should be applied to a deliberate indifference case where exercise rights were denied for approximately 370 days during a two-year period. However, such a standard confuses the issues at trial by directing a jury to utilize the excessive force standard which was designed to apply to situations where split-second decisions are being made, and not for situations where prison officials have the time and opportunity to make cool, calculated decisions regarding the prisoners' constitutional rights as well as the safety of

the prison staff and inmates. Equating these two completely different scenarios by establishing the same standard is not justified in the law, and thus demonstrates why this Court has never extended the *Whitley* excessive force standard to a deliberate indifference case challenging prison conditions.

* * *

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of *Ortiz v. Jordan*. In the alternative, the petition for a writ of certiorari should be granted, and the case should be set for full briefing and argument.

Respectfully submitted,

CARTER C. WHITE

Counsel for Petitioner

February 15, 2011